

No. 82-1250

Office-Supreme Court, U.S.  
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**FEB 24 1983**

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IN THE  
**SUPREME COURT OF THE UNITED STATES**  
OCTOBER TERM 1982

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ALEXANDER L. STEVENS,  
CLERK

THE STATE OF FLORIDA, ON THE RELATION OF  
GLEN E. SMITH, AS TRUSTEE,

*Petitioner,*

v.

ORANGE COUNTY, A POLITICAL SUBDIVISION OF  
THE STATE OF FLORIDA; ALLEN E. ARTHUR; LEE  
CHERA; DICK FISCHER; JACK MARTIN; AND LAMAR  
THOMAS, AS MEMBERS AND CONSTITUTING THE  
BOARD OF COUNTY COMMISSIONERS OF ORANGE  
COUNTY, FLORIDA; FORD S. HAUSEMAN, PROPERTY  
APPRAISER, ORANGE COUNTY, FLORIDA; EARL K.  
WOOD, AS TAX COLLECTOR, ORANGE COUNTY,  
FLORIDA.

*Respondents.*

AND

ANN ROSS, INTERVENOR AND CLASS  
REPRESENTATIVE,

*Respondent.*

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**RESPONDENT'S BRIEF IN OPPOSITION  
TO PETITION FOR WRIT OF  
CERTIORARI**

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RESPONDENT'S BRIEF IN OPPOSITION  
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## STATEMENT OF THE CASE

The Town of Bithlo issued bonds in 1924 that were never fully paid. The Town of Bithlo permanently ceased to function as a local government during World War II.

Petitioner, Glen E. Smith, obtained a final judgment by default against the Town of Bithlo in October, 1956, Case No. C.L. 28154. A certified copy of the judgment was never recorded in the Official Record Books as required by statute to impose a lien on real property in the Town of Bithlo.

Petitioner, Glen E. Smith, filed suit in 1973 in Case No. 73-7910 to enforce the judgment from Case No. C.L. 28154. Count I was a request to have the Circuit Court appoint a City Council and require it to certify a tax roll to the County Tax Assessor to pay the 1956 judgment. Count II was directed to B. C. Dodd and Mr. and Mrs. Fred Dietrich, individually and as class representatives, for other persons whose property had been ousted from the Town of Bithlo. Circuit Judge Richard Cooper ruled that the action against the Town of Bithlo be abated until proper service was obtained on Bithlo, and that the Petitioner take nothing from Mr. Dodd or Mr. and Mrs. Dietrich.

The District Court of Appeal of Florida, Fourth District, reversed Judge Cooper's ruling stating that since the Petitioner judgment-holder was not a party to the ouster suits of Mr. Dodd and Mr. and Mrs. Dietrich, that such ouster judgments were not binding as to the Petitioner. The court also ruled that service was valid on the Town of Bithlo and that the abatement was in error. *Smith v. Bithlo*, 314 So. 2d 212 (Fla. 4th DCA 1975).

The case was sent back for a new trial and was retried on the same pleadings by the Petitioner and the Defend-

ants. Attorney Johnie McLeod, representing Mr. Dodd and Mr. and Mrs. Dietrich, requested that an attorney ad litem be appointed for the Town of Bithlo to represent the landowners in the Town of Bithlo. Judge Diamantis denied that request. Judge Diamantis then ruled that

Paragraph 9. The government of the Town of Bithlo ceased to function during the Second World War.

IT IS THEREFORE ORDERED AND ADJUDGED:

3. However, since the Court has ruled that the evidence does not show that the Plaintiff is entitled to the remedy it seeks for the reasons stated in paragraph 15 of this Final Judgment, this action is abated as to the Town of Bithlo, Florida.

4. The abatement as to the Town of Bithlo, Florida, shall remain in full force and effect until further Order of Court.

Petitioner, Glen E. Smith, again appealed to the District Court of Appeal of Florida, Fourth District. The judgment based on laches in favor of Mr. Dodd and Mr. and Mrs. Dietrich was reversed, and the appellate court was informed at oral argument that there were persons willing to serve on behalf of the Town of Bithlo as its City Council. It stated that upon remand the trial clerk could determine the qualifications of these people and make the necessary appointments to represent the Town of Bithlo. *Smith v. Town of Bithlo*, 344 So. 2d 1288 (Fla. 4th DCA 1977). There is no evidence in the record that anyone was ever so appointed or that the abatement ordered by Judge Diamantis was ever lifted as to the Town of Bithlo.

While Action No. 73-7910 was pending in the appellate court, the Petitioner filed a mandamus case, Case No. 76-8768, in the Circuit Court in Orange County, Florida.

Case No. 76-8768 was abated pending the outcome of Case No. 73-7910. The lower court ordered that the mandamus suit and the earlier suit travel together as companion cases.

The Town of Bithlo was abolished by the Florida Legislature effective July 1, 1977, by Chapter 77-502, Laws of Florida, 1977. Glen Smith then moved to substitute Orange County for the Town of Bithlo and to pursue Mandamus against Orange County pursuant to § 165.052(3), Florida Statutes (1976) (App. I).

The Order of Abatement in Case No. 87-8768 was dissolved and the Motion to Substitute was granted. Orange County filed an Answer and Affirmative Defenses raising the defense of laches. Ann Ross, individually and as class representative, filed a Motion to Intervene and an Intervenor's Answer and Affirmative Defenses. Ann Ross represented the entire class of taxpayers who live in the area sought to be taxed by Plaintiff. She alleges that she had purchased her property in the Bithlo area in 1970.

All parties filed Motions for Summary Judgment and supporting Affidavits. Orange County filed Affidavits establishing a factual basis for the operation of the doctrine of laches. For example, Mr. Paul Lafata's Affidavit stated:

1. That he owns real property which is located in the former incorporated area of Bithlo, Florida, more particularly described as follows:

Tract #17, BITHLO RANCHES ANNEX, an unrecorded plat described as follows: The North 150 feet of the South 390 feet of the East 150 feet of the Northeast 1/4 of the Southeast 1/4 of Section 27, Township 22 South, Range 32 East;

all lands situate and being in Orange County, Florida.

2. That when he purchased the real property in 1978 he had no knowledge and was not advised of the 1924 Bond Issue of the City of Bithlo, or the 1956 judgment for payment of the principal and interest of the bonds.

3. That he did not reside in the Bithlo area when the 1924 bonds were issued or when the 1956 judgment was entered.

4. That in connection with the purchase of the property, he obtained a Warranty Deed which did not reflect the Judgment entered in 1956.

5. That if he had known of the Judgment, he would not have purchased this property.

6. That the assessment of additional taxes would cause a financial hardship for me which could result in the loss of my property for non-payment of taxes.

7. That I have personal knowledge of the facts contained herein.

8. That I received a title insurance policy from American Title Insurance Company when I purchased the property, the original of which is attached as Exhibit "A".

9. That I relied on the title insurance policy to show me any clouds, defects or potential problems with the property.

10. That I was present and witnessed Mrs. Thelma B. Joyner sign the Deed to us on August 3, 1978, at Orlando, Florida, at the American Title Insurance Company offices, at 639 East Colonial Drive. The original of the deed is attached as Exhibit "B".

The title policies attached as Exhibit "A" on Mr. Lafata's Affidavit and other abstracts and opinions of title filed in the record with other affidavits of various landowners did not disclose the existence of the 1956 judgment.

Mr. Lafata's situation was allowed to occur because Petitioner never recorded a certified copy of his 1956 final judgment in the Official Record Books in Orange County or filed a Lis Pendens in the 1956, 1973 and 1976 actions. Orange County made out a prima facie case of laches that was not rebutted in any way by Glen E. Smith in affidavit form or otherwise.

The trial court entered an order on April 25, 1979, granting Ann Ross' Motion to Intervene and granting the Motion for Summary Judgment in favor of the Petitioner, Glen E. Smith, on the basis that Orange County was barred from raising laches as a defense.

Because a new district court had been created for Central Florida, Orange County appealed to the District Court of Appeal of Florida, Fifth District, which initially per curiam affirmed the Summary Judgment, but in an order on Motion for Rehearing dated February 25, 1981, reversed the Summary Judgment, thereby allowing Orange County to raise the defense of laches. *Orange County v. Smith*, 395 So. 2d 1158 (Fla. 5th DCA 1981) (App. B).

Petitioner, Glen E. Smith, filed a Motion for Rehearing (App. C) that was denied (App. D).

Petitioner, Glen E. Smith, unsuccessfully sought review in the Supreme Court of Florida (App. E).

After the case was returned to the trial court, Orange County again filed a Motion for Summary Judgment and additional Affidavits similar to Mr. Lafata's. On

December 16, 1981, the Circuit Court granted Orange County and Ann Ross, Intervenor, a Final Summary Judgment (App. F). The District Court of Appeal of Florida, Fifth District, affirmed the Final Summary Judgment (App. G). The Supreme Court of Florida declined to accept jurisdiction of the case (App. H).

## QUESTIONS PRESENTED

### I. WAS A FEDERAL QUESTION DECIDED IN THE STATE COURT SYSTEM IN FLORIDA?

Impairment of contract was raised for the first time by Petitioner before the District Court of Appeal of Florida, Fifth District, in Case No. 82-94. It was never raised in the trial court as an avoidance of the affirmative defense of laches raised by Respondent as required by Florida Rules of Civil Procedure, Rule 1.100(a).

(a) *Pleadings.* There shall be a complaint or, when so designated by a statute or rule, a petition, and an answer to it; an answer to a counterclaim denominated as such; an answer to a cross-claim if the answer contains a cross-claim; a third party complaint if a person who was not an original party is summoned as a third party defendant and a third party answer if a third party complaint is served. If an answer or third party answer contains an affirmative defense and the opposing party seeks to avoid it, he shall file a reply containing the avoidance. No other pleadings shall be allowed.

The Petitioner never challenged the facts which gave rise to the defense of laches and did not appropriately avoid the defense of laches.

The Petitioner's theory of impairment of contract completely overlooks the fact that he is not suing on a contract, which in this case took the form of municipal

bond, but is rather attempting to enforce by mandamus a final judgment entered in his favor in 1956. The Petitioner's rights under the municipal bond merged into the final judgment. *Gilpin v. Bower*, 12 So. 2d 884 (Fla. 1943). The defense of laches raised by Orange County relates to rights that have developed since the judgment in 1956. Laches can be a defense to enforcement of a final judgment. On a case not too dissimilar to the case at bar where an owner of a judgment rendered in 1926 who wanted to levy in 1946 on real property that the judgment debtor had obtained by foreclosure in 1929, that had since been transferred to third parties, the Supreme Court of Florida sitting en banc held:

Appellants may satisfy their judgment within 20 years, but when undue delays are exercised without reason shown therefor, equitable defenses become available that may cut off the right to satisfy the judgment. In the 17 years of silence, many things could take place that would make it unconscionable to satisfy the judgments in question. The court below refused to grant relief, and we cannot say that he committed error in the light of defenses raised. *Orr vs. Allen-Hanford*, 27 So. 2d 823 (Fla. 1946).

In *Blocker v. Ferguson*, 47 So. 2d 694 (Fla. 1950), the Supreme Court of Florida also sitting en banc held that the rights of a party under a decree in his favor for money damages can forfeit those rights by his actions if they constitute laches.

Cases cited by Petitioner in support of his impairment of contract theory did not deal with judgment creditors attempting to enforce their rights. The cases of *Morton v. Zuckerman-Vernon Corp.*, 290 So. 2d 141 (Fla. 3d DCA 1974), and *United States ex rel. Vermont Investment Co. v. City of Cocoa*, 17 F. Supp. 59 (S.D. Fla.

1936), relate to judicial intervention between mortgagors and mortgagees in situations where there is a dispute over the terms and conditions of the purchase contract.

In the case at bar, all Petitioner's rights that he was entitled to as the holder of the bonds were established and perfected by the final judgment in 1956. It is what has happened since 1956 which has caused his rights under the judgment to be called into question. In upholding laches in this action, the State of Florida has not impaired the contract rights of the Petitioner, nor has it cast any shadow on the ability of any municipal corporation to raise money through bond indentures.

No federal question was properly raised in the state court, nor does one exist. None of the citations by Petitioner to the Constitution of the United States or the Amendments thereto are applicable.

Article I, Sec. 10, of the Constitution of the United States refers to the proposition that no state shall pass any law impairing the obligation of contracts. Aside from the basic fact that the Petitioner is suing on a judgment, not a contract, the Legislature of the State of Florida did not pass any laws which impaired any of his rights. In fact, Chapter 77-502, Laws of Florida, abolished the Town of Bithlo and § 165.052(3), Florida Statutes (1976) (App. I), allowed Orange County to be substituted as party-defendant in its stead.

The Fifth and Fourteenth Amendments to the Constitution of the United States only possible connection with this case is that they refer to the right of a citizen not to have his property taken without due process of law. This case has had an abundance of due process of law with four trips through the state appellate court system and three trips to the Supreme Court of Florida.

The Petitioner lost in the state courts because he did not perfect his rights after receiving the 1956 final judgment by giving the required public notice. Section 55.10, Florida Statutes (Laws of Florida 1939, Chapter 19270), provides:

No judgment or decree hereafter rendered by the Circuit Courts of any other courts of this state shall be or become a lien on real estate until a certified transcript of said judgment or decree is recorded in the judgment lien record as provided by Section 28.21, subsection (11), of these statutes. Upon being so recorded, said judgment or decree shall become a lien on the real estate only in the county where the same is recorded in the manner provided by Section 28.21.

Petitioner did not comply with § 55.10, Florida Statutes, as Circuit Judge George Diamantis' Final Judgment in Case No. 73-7910, dated April 2, 1976, specifically found:

Plaintiff's judgment was not recorded other than the minute book and the evidence shown that there has been property bought in Bithlo by one of the defendants after that suit was filed. Further, Plaintiff never filed a Lis Pendens in that case (C.L. 28154).

Not only did Petitioner fail to file a Lis Pendens in the 1956 suit, but it also failed to file a Lis Pendens in the 1973 suit and the 1976 suit.

As set forth more fully in Respondent's Motion for Rehearing (App. A), members of the public purchased land in Bithlo after 1973, and there was still no record notice that the Petitioner was attempting to enforce rights against the property they were purchasing.

The opinion by the District Court of Appeal of Florida, Fifth District, February 25, 1981 (App. B), held that the doctrine of res judicata cannot be used to bar Orange County from raising a defense of laches because it would be inequitable to do so and the Court cited *deCancino v. Eastern Airlines, Inc.*, 283 So. 2d 97 (Fla. 1973). The Court thereafter inaccurately found that no default has been entered against the Town of Bithlo. Although the lack of a default was not the premise of the Court's holding, Petitioner quickly pointed out in its Motion for Rehearing (App. C) that Bithlo had been twice defaulted. The Court properly chose not to reverse its ruling on rehearing.

In the next appeal, 82-94, to the District Court of Appeal of Florida, Fifth District, Chief Judge Orfinger did not, as Petitioner implied, say that the Court had erred in its previous ruling, but said that even if it had erred, it couldn't change its ruling because of the *State of Florida v. Judges of the District Court of Appeal of Florida, Fifth District*, 405 So. 2d 980 (Fla. 1981), which held that the power of an appellate court to recall its mandate and reconsider a case is limited to its term of court.

There are adequate and independent non-federal grounds for the decisions that have been reached by the state courts. It is well accepted that the Supreme Court of the United States will not review a decision of the state court resting upon adequate and independent non-federal grounds. *Bell v. Maryland*, 378 U.S. 226, 12 L. Ed. 2d 822, 84 S. Ct. 1841.

Without conceding that a federal question is even present, the United States Supreme Court is without jurisdiction to review a case if the state court rests its decision on both state and federal grounds, either of

which is dispositive. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 53 L. Ed. 2d 965, 97 S. Ct. 2849.

In summary, although this may be one of the most complex, convoluted case histories the Court has seen in a while, the simple fact remains that the defense of laches prevailed because the Petitioner did not perfect his rights in the 1956 judgment as required by § 55.10, Fla. Stat. (1939), and by failing to file an appropriate *Lis Pendens*. Thereafter, much like bona fide purchasers for value, the public purchased land in Bithlo without knowledge of the judgment that Petitioner now seeks to levy a tax that the landowner would have to pay pursuant to § 165.052(3), Fla. Stat. (1965) (App. I). Not to allow Orange County to present the defense of laches would be a travesty of justice and totally inequitable. The District Court of Appeal of Florida, Fifth District, held in Case No. 79-1508 (App. B):

Orange County was substituted as Bithlo's "alter-ego" and for the first time is sought to raise the defense of laches on behalf of Bithlo. The trial court held Orange County was barred from raising this defense, and that is the issue presented on this appeal.

Bithlo and Orange County never had an opportunity to raise the defense of laches in either suit. During this litigation, Bithlo had ceased to function and to exist for all practical purposes, and there were no people or agents to represent it. Both the trial and appellate courts recognized this fact. Bithlo is analogous to an incompetent for whom no guardian has been appointed or a deceased person for whom no personal representative existed. Under these circumstances it would be inequitable to bar Orange County from raising this defense, even if

the doctrine of res judicata or collateral estoppel applied. *deCancino v. Eastern Airlines, Inc.*, 293 So. 2d 97 (Fla. 1973).

Petitioner's argument really boils down to the fact that he doesn't like the quoted ruling. Petitioner claims that this is an unconstitutional taking of his property without due process of law. Such is not the case. The District Court was simply following a precedent set forth in *Orr v. Allen-Hanford*, *supra*, and *Blocker v. Ferguson*, *supra*. The equities, law and logic are with Respondent, Orange County.

## II. WHETHER THE PETITIONER HAS WAIVED HIS RIGHT TO SEEK REVIEW OF A FEDERAL QUESTION BECAUSE IT WAS NOT RAISED IN THE TRIAL COURT?

Petitioner has waived his right to raise a federal question by failing to bring it to the attention of the trial court when the appellate rules of the state so require. *Louisville & Nashville Railroad Co. v. Ford*, 234 U.S. 46, 58 L. Ed. 1202, 34 S. Ct. 739; *Erie Railroad v. Purdy*, 183 U.S. 148, 46 L. Ed. 847, 22 S. Ct. 605; *Atlantic Coast Line Railroad Company v. Mims*, 242 U.S. 532, 61 L. Ed. 476, 37 S. Ct. 188.

The rule of appellate review in Florida is that questions not timely raised and ruled upon in the trial court will not be considered on appeal. This rule was founded on consideration of practical necessity in fairness to the trial court and the opposing party. *Hartford Fire Insurance Co. v. Hollis*, 58 Fla. 268, 50 So. 985 (Fla. 1909); *Cowart v. West Palm Beach*, 255 So. 2d 673 (Fla. 1971).

**CONCLUSION**

**Respondent, Orange County, respectfully requests this Court to decline to accept jurisdiction of this cause.**

**Respectfully submitted,**

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**APPENDIX A**  
**IN THE DISTRICT COURT OF APPEAL**  
**OF THE STATE OF FLORIDA**  
**FIFTH DISTRICT**

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**Appeal No. 79-1508**

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***Orange County***, a political subdivision  
of the State of Florida,

***Appellant,***

***v.***

***The State of Florida***, on the relation of  
***Glen E. Smith***, as Trustee, and ***Ann Ross***,

***Appellees.***

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**MOTION FOR REHEARING**

As this is an important case to the approximately 1,500 land owners in the former Town of Bithlo, and since it is difficult to determine from the Per Curiam Affirmed decision what points the Court may have overlooked or misconstrued, Appellant requests the Court's grace in filing this lengthy Motion for Rehearing in this long, difficult and complicated matter.

It appears to the Appellant that the questions of whether laches can be raised as a defense to a final judgment, whether a municipality can raise laches, and whether Orange County proved laches by its affidavits, are clearly resolvable in the favor of Orange County. The question that remains is whether or not Orange County is entitled to raise laches. This will be treated in two parts.

The first part will be the question raised by the Court at oral argument not previously raised in the briefs, and the second part will deal with a succinct review of the reasoning on which the appeal was based.

The question that the Court raised at oral argument that was not raised in the Final Judgment or in the Appellee's brief is whether the Second Appellate decision in *Smith v. Town of Bithlo*, 344 So. 2d 1288 (Fla. 4th D.C.A. 1977), reversing Judge Diamantis' decision for Dodd and the Dietrichs on the question of laches, precludes the County from raising the defense of laches to the judicial enforcement of the Final Judgment entered in 1956 because laches is *res judicata*. The answer is that neither Judge Diamantis' nor the Second Appellate decision decided laches as to the Town of Bithlo. The only decision on laches was as to B. C. Dodd, H. R. Dietrich and Florence Dietrich, his wife. The holding of Judge Diamantis' in Case No. 73-7910, was

"IT IS THEREFORE ORDERED AND ADJUDGED AS FOLLOWS:

1. The Defendants, B. C. DODD and H. F. DIETRICH and FLORENCE DIETRICH, his wife, constituting a class of owners of properties in the Town of Bithlo, Florida, shall go hence without delay, and this action is dismissed as to said Defendants with prejudice. (The class that they represented was a class of people whose property had been previously ousted from the Town of Bithlo.)
2. As to the Defendant, THE TOWN OF BITHLO, FLORIDA, which is in default since no answer and defenses have been filed on its behalf, it cannot raise a defense of laches nor can the individual Defendants raise it on its behalf.

3. However, since the Court has ruled that the evidence does not show that the Plaintiff is entitled to the remedy it seeks for the reasons stated in Paragraph 13 of this Final Judgment, this action is abated as to the Town of Bithlo, Florida.
4. The abatement as to the Town of Bithlo, Florida, shall remain in full force and effect until further order of this Court."

There was never any order dissolving the abatement of the Final Judgment as to the Town of Bithlo. In the Final Judgment, it is clear that no judgment was entered against the Town of Bithlo, which is appropriate since Judge Diamantis found in numbered Paragraphs 9 and 10 of his Final Judgment that

- " 9. The government of the Town of Bithlo ceased to function during the Second World War.
10. There is no qualified electorate or person whomsoever in the Town of Bithlo who is willing to perform any of the functions and duties prescribed by any of the provisions of Florida Statutes, Chapter 165, 166, 70 and 171, nor is there any elector or any person whomsoever in said town who is willing to perform any governmental function whatever connected with the conduct, operation and government of said municipality."

Those reasons caused attorney McLeod at the trial to request an attorney ad litem (A-1). The judge refused to do that.

Had the Court appointed an attorney ad litem and had the issue been tried and resolved with finality, res judicata might be an avoidance of Orange County's defense of laches, since the tests for res judicata of (1) finality of the judgment, and (2) identity of parties, would have been substantially met.

However, the question of laches cannot be res judicata since it was not decided in Case No. 73-7910 as to the Town of Bithlo or its citizens. *Shook v. Southern Railway Co.*, 113 S.E.2d 155 (Ga. App.); *Oyster v. Oyster*, 28f 909 Aff'd, *Albright v. Oyster*, 140 U.S. 493, 35 L. Ed. 534, 11 S. Ct. 916; *Kelly-Springfield Tire Co. v. Haugherty*, 219 N.W. 752 (Mich. App.); *Olson v. Colfield School District*, 210 N.W. 180 (Nd). Since all the property owners in the Town of Bithlo were not involved in Case No. 73-7910, there is no identity of parties with Case No. 76-8768. By virtue of § 165.052 Florida Statutes, Orange County does represent all of the property owners of the Town of Bithlo in Case No. 76-8768 and should be able to raise laches.

In Case No. 76-8768, Judge Diamantis misconstrued the nature of the current defense of laches when he used as a reason to grant the Summary Judgment in favor of the Plaintiff, the failure of Bithlo to raise laches as a defense in the 1956 Judgment. The factual basis for the defense of laches has developed since 1956 by the Plaintiff failing to adequately record his Judgment, and then sitting on its rights for a period of 17 years, which has been held by the Second Appellate decision in this matter to be a long enough period for laches to attach. The affidavits show that people purchased property after 1956, some using title insurance and others relying on abstract examination, none of which revealed the Final Judgment of the Plaintiff. Dodd and the Dietrichs had purchased property in Bithlo prior to the 1956 judgment and could not possibly establish laches on the same basis as has been proven by Mr. Lafata and others in affidavits filed by Orange County. They could not and did not represent a class of land owners who purchased land after 1956, as Ann Ross attempted to do by intervening in Case No. 76-8768.

The Town of Bithlo hasn't functioned since World War II and no one could represent it except for an attorney ad litem appointed by the Court, because no attorney would vouch for his authority to do so as required by Rule 1.030 F.R.C.P. Consequently, no one could raise the defense of laches in Case No. 76-8768. Clearly in this legal quagmire, the people of Bithlo were entitled to some representation or to be joined in the lawsuit. They were not joined in Case No. 73-7910 or Case No. 76-8768 (notices of lis pendens were not even filed in either lawsuit to alert subsequent purchasers such as Mr. Lafata, whose affidavit is filed in this matter (R-270-279), nor was legal counsel provided on their behalf to raise the defense of laches.

Now the land owners of Bithlo are told that the defense is waived because it wasn't raised in the lawsuit. If that's not Catch-22, I don't know what is. The land owners are now and have been in a legal Never-Never Land. They have had no way to defend themselves in Case No. 73-7910 or in Case No. 76-8768. To leave them wholly without representation is unconscionable and unjust. Courts of equity have historically fashioned remedies to fit the situation. To date, no due process has been accorded to the post-1956 land purchasers.

The only possible argument for the Appellee here is that the people should have formed a government to represent them. When? In 1956? In 1973? In 1976? And exactly how should the knowledge have come to their attention that it would behoove them to form a government? When Paul Lafata (R-270-279) purchased his land in 1978 after receiving a title insurance policy from American Title Insurance Company, he not only did not know about the 1956 judgment, but he didn't know about Case No. 73-7910 or Case No. 76-8768.

If he had had that knowledge his affidavit states he wouldn't have purchased the property. If laches is res judicata as to Paul Lafata and others like him, what kind of a legal system are we operating? To say that the Plaintiff's rights, long unasserted, and only recently asserted, but without proper public notice now or in 1956, are superior to bona fide purchasers without notice is a travesty of justice.

Orange County respectfully requests this Court to grant a rehearing of this matter and permit oral argument, enter judgment for it on the appeal, or write an opinion and certify that opinion as a question of great public interest.

Respectfully submitted,

/s/ J. Charles Gray

/s/ James F. Page, Jr.

Gray, Adams, Harris & Robinson

P. O. Box 3068

Orlando, Florida 32802

(305) 843-8880

*Attorneys for Appellants*

#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished to Byrd V. Duke, Jr., Esquire, The Executive Building, Suite 205, 1175 N.E. 125th Street, North Miami, Florida, 33161; Steven R. Bechtel, Esquire, 600 Southeast National Bank Building, 201 E. Pine Street, Orlando, Florida, 32801; and to Herbert R.

Swofford, Esquire, P. O. Box 6236, Orlando, Florida,  
32803, by mail this 9th day of July, 1980.

/s/ J. Charles Gray

/s/ James F. Page, Jr.

Gray, Adams, Harris & Robinson

P. O. Box 3068

Orlando, Florida 32802

(305) 843-8880

*Attorneys for Appellants*

---

APPENDIX B

IN THE DISTRICT COURT OF APPEAL  
OF THE STATE OF FLORIDA  
FIFTH DISTRICT

---

Case No. 79-1508/T4-648

---

*Orange County*, a political subdivision  
of the State of Florida,  
*Appellants*,

v.

*The State of Florida*, on the relation of  
*Glen E. Smith*, as Trustee, and *Ann Ross*,  
*Appellees*.

---

Opinion filed February 25, 1981

APPEAL FROM THE  
CIRCUIT COURT FOR ORANGE COUNTY  
*George N. Diamantis, Judge*

*James F. Page, Jr.*, of Gray, Adams, Harris & Robinson, P.A., Orlando, for Appellants.

*Byrd V. Duke, Jr.*, North Miami, for Appellee Glen E. Smith.

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ON MOTION FOR REHEARING

SHARP, W., J.

The motion for rehearing is granted because this court overlooked the fact, due to the voluminous record in this

case and the inadequacy of the briefs, that the City of Bithlo was never defaulted in the prior litigation, and therefore the substituted party, Orange County, should not be foreclosed from raising the defense of laches.

The appellee filed suit in 1956 to recover the principal and interest due on improvement bonds issued by the City of Bithlo in 1924, and obtained a judgment. No action was taken to recover on the judgment until 1973, when suit was filed against Bithlo in case number 73-7910. This suit against Bithlo was "abated" for insufficiency of process. On appeal this judgment was reversed on other grounds.<sup>1</sup> After remand the trial court said Bithlo could not raise the defense of laches because it was "in default," although apparently no default was ever obtained against Bithlo. The trial court then abated the action as to Bithlo because there were no qualified persons who were willing to perform any governmental function connected with Bithlo. This judgment was also appealed.

While the appeal was pending the appellant brought suit for mandamus in an effort to compel Bithlo to levy taxes to pay the judgment. The trial court abated that suit until the appellate court rendered its decision in the case on appeal.

The appellate court was informed that there were persons willing to serve on behalf of Bithlo. It stated that upon remand the trial court could determine the qualifications of these people and make the necessary appointments to represent the City of Bithlo.<sup>2</sup> There is no evidence in the record before us that anyone was ever so appointed or that this action was ever revived.

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<sup>1</sup> Smith v. Bithlo, 314 So. 2d 212 (Fla. 3d DCA 1975).

<sup>2</sup> Smith v. Bithlo, 344 So. 2d 1288 (Fla. 4th DCA 1977).

The lower court ordered that the mandamus suit and the earlier suit travel together as companion cases. Orange County was substituted as Bithlo's "alter ego"<sup>3</sup> and for the first time it sought to raise the defense of laches on behalf of Bithlo. The trial court held Orange County was barred from raising this defense, and that is the issue presented on this appeal.

Bithlo and Orange County never had an opportunity to raise the defense of laches in either suit. During this litigation Bithlo had ceased to function and to exist for all practical purposes, and there were no people or agents to represent it. Both the trial and appellate courts recognized this fact. Bithlo was analogous to an incompetent for whom no guardian had been appointed or a deceased person for whom no personal representative existed. Under these circumstances it would be inequitable to bar Orange County from raising this defense even if the doctrine of *res judicata* or collateral estoppel applied. *De Cancino v. Eastern Airlines, Inc.*, 283 So. 2d 97 (Fla. 1973). However, since Bithlo was never actually defaulted, and both actions were "abated" as to it, *res judicata* should not apply in any event. *Burleigh House Condominium, Inc. v. Buchwald*, 368 So. 2d 1316 (Fla. 3d DCA), *cert. denied* 379 So. 2d 203 (1979); *Donaldson Engineering, Inc. v. City of Plantation*, 326 So. 2d 209 (Fla. 4th DCA 1976). The summary judgment appealed is reversed in so far as it forecloses the right of Orange County to plead and attempt to prove the defense of laches. This matter is remanded to the trial court to permit the appellants to file an answer and any affirmative defenses available to it.

REVERSED and REMANDED.

DAUKSCH, C.J. and COBB, J., concur.

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<sup>3</sup> Ch. 77-502, Laws of Florida.

**APPENDIX C**

**IN THE DISTRICT COURT OF APPEAL  
OF THE STATE OF FLORIDA  
FIFTH DISTRICT**

---

**Appeal No. 79-1508/T4-648**

---

***Orange County***, a political subdivision  
of the State of Florida,

***Appellant,***

***v.***

***The State of Florida***, on the relation of  
***Glen E. Smith***, as Trustee, and ***Ann Ross***,

***Appellees.***

---

**MOTION FOR REHEARING**

The State of Florida, on the relation of Glen E. Smith, as trustee, Appellee in the above-styled cause, by and through his attorney, respectfully moves this Court to set aside and withdraw its decision and opinion entitled "On Motion for Rehearing" filed February 25, 1981, reversing the Final Summary Judgment and Order on Other Pending Matters rendered by the trial court for this Appellee and to rehear this cause on the following grounds:

(A) This Court has overlooked or misapprehended the following points of law, or facts:

1. The Town of Bithlo was defaulted in the prior litigation, case no. 73-7910, Circuit Court in and for Orange County, Florida, said defaults having been entered on

January 14, 1974, on page 44 (A-1) and again on June 4, 1974 on page 75 (A-2). Because this Court has gone beyond the scope of the record of case no. CI 76-8768 it is necessary to file an appendix to clear up misapprehension of facts by this Court and to aid the Court to locate pleadings or documents filed in the voluminous record of the case on appeal:

(a) Copy of Entry of Default by Clerk against the Town of Bithlo filed January 14, 1974 (A-1).

(b) Copy of letter dated August 9, 1976 and Amended Index (case 73-7910) furnished for the appeal to the 4th District Court of Appeal of Florida, case no. 76-808, Smith vs. Bithlo, 344 So. 2d 1288, Fla. DCA 1977 (A-2).

(c) Order for Substitution of Orange County, Florida, a political subdivision of the State of Florida, in the former litigation (A-3).

2. In Smith vs. Bithlo, 314 So. 2d 212 Fla. (4th DCA 1975), the Court is correct that the suit was "abated" for insufficiency of process. The Appellate Court reversed the case holding that service was valid via Fla. Stat. § 48.111(3) 1973 and also Fla. Stat. § 49.021 (1973) and should not have been abated for lack of service. The other error was that Plaintiff (bond holder) was not a party to the Defendant's judgment of ouster and Plaintiff's claim was not barred. Both defaults against the Town of Bithlo were in effect during the first appeal.

3. The record of this Mandamus proceeding in Petition for Writ of Mandamus (R 1-5) is evidence that Earl Taylor, as Mayor; Ted McElwee, David Shaw, Ralph Kemp, Hobart Strickland and Richard Trimble, as aldermen of the Town of Bithlo, represented the Town in this action, and appeared by counsel (Motion To Dismiss, Consolidate, Reassign or Abate (R 23-40) and Order

Denying Motion To Dismiss and Consolidate Order Transferring Cause (R 32-33)).

4. Pursuant to Section 165.052 the Secretary of State declared the Town of Bithlo to be an inactive municipality and proper notice was filed and published. The legislature of the State of Florida passed Chapter 77-502, Law of Florida, Acts of 1977 to take effect July 1, 1977, abolishing the Town of Bithlo.

5. Second Amended Petition for Writ of Mandamus was filed on April 6, 1978 (R 55-70) and Orange County and each member of the Board of County Commissioners were named Defendants (R 88-89) and were duly served.

6. Orange County and the members of the County Commission filed Answer (R 115) to Alternative Writ of Mandamus which set up only defense of laches and barred by the statute of limitations, all other matters in Petition and Writ were admitted.

7. The legislature by Chapter 77-502, Law of Florida, Act of 1977 abolished the Town of Bithlo, transferring all property to Orange County and provided:

“and all legal and lawful debts and obligations of the town shall be satisfied with the procedure provided in general law, . . . .”

Florida Statute 165.09(3) authorizes the county to levy and collect ad valorem taxes from the area of the pre-existing town for repayment of any assumed debts. See also F.S. 165.061(3).

8. Attached to the Motion for Summary Judgment (R 119) is attached a Final Judgment (R 121-126) in case 7910 and on page 126 the trial judge adjudged:

“2. As to the Defendant, The Town of Bithlo, Florida which is in default since no answer and defenses have been filed on its behalf, it cannot

raise the defense of laches nor can the individual Defendants raise it on its behalf. This same Final Judgment is attached to memorandum of law (R 187) and also is included in Appellant's Appendix to Brief of Appellant (A 1 A-2) and Supplementary Memorandum of Law and Compliance with 5(13) of Order Setting Non Jury Trial and Pre-Trial Instructions (R 682-638)."

9. In the Final Judgment, case 73-7910, included in this record as described above, the Court found it has jurisdiction of the parties and of the subject matter. That service on the Defendant, Town of Bithlo, was valid.

10. In such Final Judgment on page 6 attached to Motion for Summary Judgment (R 119) is the following adjudication:

"2. As to the Defendant, The Town of Bithlo, Florida, which is in default, since no answer and defenses have been filed on its behalf, it cannot raise the defense of laches nor can the individual defendants raise it on its behalf."

11. Parties may not relitigate matters actually litigated and determined in prior suits, *Bardwell v. Langston*, 244 So. 2d 742 (Fla. 4th DCA 1971); *Nelson v. Rever*, 294 So. 2d 879 (Fla. 3rd DCA 1972).

12. Rules of Civil Procedure, Rule 1.500(e) reads: Final Judgment after default may be entered at any time but no such judgment may be entered against an *infant* or *incompetent person* unless represented in the action by a general guardian, committee, conservator or other representative who has appeared therein.

13. F.S. 744.102 defined "guardian", "guardian ad litem", "incompetent", "minor", does not indicate that the Town of Bithlo was dead or an incompetent to

prevent the Final Judgment from being entered against it after default.

14. A default judgment rendered by a Court having jurisdiction of subject matter, regular on its face, is not void or amenable to collateral attack. *Ennis v. Giblin*, 147 Fla. 113, 2 So. 2d 382 (Fla. 1941).

15. The Defendant, Orange County, and its officials are bound by the judgment against Bithlo in the 1973 litigation. They cannot now raise laches on behalf of the Bithlo property owners who are equally bound by that judgment in the 1973 mandamus action. *Young v. Miami Beach Improvement Co.*, 46 So. 2d 26, 30 (Fla. 1950); *City of New Port Richey v. State ex rel. O'Malley*, 145 So. 2d 903 (Fla. 2nd DCA 1962).

16. Where defenses are insufficient as matter of law, it is without legal probative force and the trial judge would be entitled to enter a Summary Judgment. *Home Federal Savings and Loan Association of Hollywood v. Emile*, 336 So. 2d 473 (Fla. App. 3rd 1976).

17. Where Plaintiff must show that affirmative defenses have no basis in fact to be entitled to a Summary Judgment, Defendant cannot by raising purely paper issue forestall granting of relief where pleading and evidentiary matters before court show that in fact or law. *Reflex, N.V. v. Urmet Trust*, 336 So. 2d 473 (Fla. 3rd 1976).

18. Orange County failed to raise an issue about the default in previous case in opposition to Motion for Summary Judgment and did not raise an issue of material facts and Appellee was entitled to a Summary Judgment. *Connolly v. Sebeco*, Fla. 89 So. 2d 482.

19. A judgment against a municipal corporation is a matter of great interest to all its citizens. It is binding

on the latter, even though not a nominal parties to such judgment and cannot relitigate which are litigated in the original action against the municipality or its legal representatives. If the municipality fails to avail itself of legal defenses, the people are concluded by the judgment. Sec. 245, Judgment 123 Fla. Juris.

20. In the prior litigation, the trial Court in the Final Judgment, 73-7910 dated the 2nd day of April, 1976 (R 121-126) held that Bithlo never raised the defense of laches and also held that Bithlo had a legal duty to the Plaintiff to levy and collect the necessary taxes to pay the Plaintiff's judgment and Bithlo owes the amount of the judgment. This portion of judgment was not reversed in *Smith v. Town of Bithlo*, 344 So. 2d 1288 (Fla. 4th DCA 1977).

21. RCP Rule 1.210(b) provided for the appointment of a Guardian ad Litem for only an infant or incompetent person, Fla. Statutes 65.061, and appears to be the only statute involving Guardian ad Litem, and it has no application here. The rule and statute are clearly for an infant or incompetent person and not for an inactive municipal corporation.

22. Statement in the decision stating Bithlo was analogous to an incompetent for whom no guardian had been appointed or a deceased person for whom no personal representative existed is contrary to existing law or the application thereof.

23. Where a valid legislature mandate is clear the Court does not have the judicial power to ignore it or otherwise hold it for naught because a judge personally thinks the problem should be handled in some other fashion. *Twomby v. Clayshon*, 234 So. 2d 338 (Fla. 1979). To determine the legislature's intent we look to the plain language of the statute. The law clearly requires

that the legislature's intent be determined primarily from the language of the statute is to be taken, construed and applied in the form enacted. *Thayer v. State*, 335 So. 2d 815 (Fla. 1976). See *Seasons v. Johnson*, 378 So. 2d 1260 (Fla. 5th DCA 1979).

24. This Court is not to determine issue not raised by the pleadings nor presented to the trial court, or not argued in the Appellant's brief. This Court should not go beyond the record as to matters. *Widmeyer v. Olds*, 144 So. 2d 825 (Fla. DCA 2nd 1962).

25. Since Bithlo did default, *res judicata* should apply. F.S. 95.05 makes a certified copy of judgment *prima facie* evidence of the entry and validity of such judgment. The Appellee in this mandamus action, is seeking the same relief upon the 1956 Judgment that he sought in the 1973 mandamus action against Bithlo (R 787-792) (page 791).

Parties and privie thereto are bound by a judgment and was effective against Orange County, and the taxpayers and owners of property in the former Town of Bithlo.

Appellee, therefore moves this Court to reconsider its decision dated February 25, 1981, and to withdraw it and reinstate its decision, *per curiam*, affirming the Summary Final Judgment of the trial Court.

Respectfully submitted,

/s/ Byrd V. Duke, Jr.

*Attorney for Appellee*

The Executive Building, Suite 205  
1175 N.E. 125th Street  
North Miami, Florida 33161  
(305) 891-2532

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy hereof has been furnished to Steven R. Bechtel, attorney for Defendants; Ford S. Hausman, property appraiser; and Earl R. Wood, as tax collector for Orange County, Florida, at Southeast National Bank Building, Suite 600, Orlando, Florida; and to James F. Page, Jr., attorney for Orange County, Florida, and its County Commissioners, at P. O. Box 3068, Orlando, Florida, this 10th day of March, 1981.

/s/ Byrd V. Duke, Jr.

[Received: March 12, 1981]

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APPENDIX D

IN THE DISTRICT COURT OF APPEAL  
OF THE STATE OF FLORIDA  
FIFTH DISTRICT

---

Case No. 79-1508/T4-648

---

*Orange County, etc.*

*Appellant,*

*v.*

*The State of Florida, on the relation of  
Glen E. Smith, etc., et al.,*

*Appellee.*

---

Date: April 2, 1981

BY ORDER OF THE COURT:

ORDERED that Appellee's MOTION FOR REHEARING, filed  
March 12, 1981, is denied.

I hereby certify the foregoing is (a true  
copy of) the original court order.

Frank J. Habershaw, Clerk

By: /s/ Rowland W. Halliday  
Deputy Clerk

[Court Seal]

cc: Byrd V. Duke, Jr., Esquire  
Steven R. Bechtel, Esquire  
James R. Page, Jr., Esquire

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APPENDIX E

SUPREME COURT OF FLORIDA

---

Case No. 60,512

District Court of Appeal  
Fifth District No. 79-1508/T4-648

---

*Glen E. Smith,*  
*Petitioner,*

*v.*

*Orange County, etc., et al.,*  
*Respondents.*

---

Wednesday, July 15, 1981

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ADKINS, Acting C.J., OVERTON, ENGLAND, ALDERMAN  
and McDONALD, JJ., concur.

A True Copy

TEST:

/s/ Sid J. White  
Clerk, Supreme Court

cc: Hon. Frank J. Habershaw, Clerk  
W. D. Goreman, Clerk  
George N. Diamantis, Judge  
Byrd V. Duke, Jr., Esquire  
Steven R. Bechtel, Esquire  
James F. Page, Jr., Esquire  
Herbert R. Swofford, Esquire

---

APPENDIX F

IN THE CIRCUIT COURT  
OF THE NINTH JUDICIAL CIRCUIT  
IN AND FOR ORANGE COUNTY, FLORIDA

---

Case No. CI 76-8768

---

*The State of Florida*, on the relation of *Glen E. Smith*, as trustee,  
*Plaintiff*,

*v.*

*Orange County*, a political subdivision of the State of Florida; *Allen E. Arthur*; *Lee Chira*; *Dick Fischer*; *Jack Marin*; and *Lamar Thomas*, as members and constituting the Board of County Commissioners of Orange County, Florida; *Ford S. Hausman*, Property Appraiser, Orange County, Florida; *Earl K. Wood*, as Tax Collector, Orange County, Florida,  
*Defendants*,

AND

*Ann Ross*,  
*Intervenor and Class Representative*.

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FINAL SUMMARY JUDGMENT

This cause having come on for hearing on the Motion for Summary Judgment filed by Defenant, ORANGE COUNTY, and the Court having considered same; having reviewed the pleadings, exhibits, and copies of the

Affidavits filed November 9, 1981, the Affidavits were exhibited to the Court, and the Court having relied on same; having heard arguments of counsel; and being otherwise fully advised in the premises, it is therefore,

ORDERED AND ADJUDGED that in accordance with the Order granting Defendant's Motion for Summary Judgment dated December 1, 1981, Final Judgment is hereby entered in favor of Defendant, ORANGE COUNTY, and Intervenor, ANN ROSS, and against the Plaintiff.

DONE AND ORDERED in Chambers in Orlando, Orange County, Florida, this 16th day of December, 1981.

The party preparing/presenting this paper will, under the direction of the Court, serve same and so certify hereon, with date.

/s/ Claude R. Edwards  
Circuit Court Judge

#### CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished by mail this 16th day of December, 1981, to JAMES F. PAGE, JR., ESQUIRE, Gray, Harris & Robinson, P. O. Box 3068, Orlando, Florida 32802; BYRD V. DUKE, JR., ESQUIRE, The Executive Building, Suite 205, 1175 N.E. 125th Street, North Miami, Florida 33161; and HERBERT R. SWOFFORD, ESQUIRE, 1212 East Colonial Drive, Orlando, Florida.

[ Signature ]  
Secretary to Circuit Judge

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APPENDIX G

IN THE DISTRICT COURT OF APPEAL  
OF THE STATE OF FLORIDA  
FIFTH DISTRICT  
July Term 1982

---

Case No. 82-94

---

*The State of Florida*, on the relation of  
*Glen E. Smith*, as trustee,

*Appellant*,

v.

*Orange County*, etc.; *Allen E. Arthur*; *Lee Chira*; *Dick Fischer*; *Jack Martin*; and *Lamar Thomas*, etc.; *Ford S. Hausman*, etc.; *Earl K. Wood*, etc.; and *Ann Ross*, etc.,

*Appellees*.

---

Decision filed September 29, 1982

APPEAL FROM THE  
CIRCUIT COURT FOR ORANGE COUNTY  
*Claude R. Edwards*, Judge

*Byrd V. Duke, Jr.*, North Miami, for Appellant.

*James F. Page, Jr.*, of Gray, Harris & Robinson, P.A.,  
Orlando, for Appellees.

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PER CURIAM.

AFFIRMED.

ORFINGER, C.J., DAUKSCH and UPCHURCH, F., JJ., concur.

Not final until the time expires to file rehearing motion, and, if filed, disposed of.

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APPENDIX H

SUPREME COURT OF FLORIDA

---

Case No. 62,806

District Court of Appeal, 5th District  
No. 82-94

---

*Glen E. Smith, etc.,*  
*Petitioner,*

*v.*

*Orange County, etc., et al.,*  
*Respondents.*

---

Friday, October 29, 1982

It appearing to the Court that it is without jurisdiction, the Petition to Invoke Inherent or Implied Jurisdiction to Prevent the Taking of Property Without "Due Process" in Violation of the 5th and 14th Amendments of U.S. Constitution and the Florida Constitution and the Declaration of Rights and Discretionary Jurisdiction is hereby dismissed.

A True Copy

TEST:

/s/ Sid J. White

Clerk, Supreme Court

cc: Hon. Frank J. Habershaw, Clerk

Hon. William D. Gorman, Clerk

James F. Page, Jr., Esquire

Hon. Claude R. Edwards, Judge

Herbert R. Swofford, Esquire

Byrd V. Duke, Jr., Esquire

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## APPENDIX I

## FLORIDA STATUTES

## SECTION 165.052(3)

## SPECIAL DISSOLUTION PROCEDURES

\* \* \*

(3) If any municipality or special district declared inactive pursuant to this section owes any debt at the time of proclamation, any property or assets of such unit, or which belonged thereto at the time of such proclamation, shall be subject to legal process for payment of such debt. After the payment of all the debts of said inactive municipal or special district corporation, the remainder of its property or assets shall escheat to the county wherein located. If, however, it shall be necessary, in order to pay any such debt, to levy any tax or taxes on the property in the territory or limits of the inactive municipality or special district, the same may be assessed and levied by order of the county commissioners of the county wherein the same is situated, and shall be assessed by the county property appraiser and collected by the county tax collector. The proceedings in the assessment, collection, receipt, and disbursements of such taxes shall be like the proceedings concerning county taxes as far as applicable.

\* \* \*

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